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Extreme poverty and human rights*

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, submitted in accordance with Human Rights Council resolution 35/19.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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Report of the Special Rapporteur on extreme poverty and human rights

Summary

Privatization is generally presented as a technical solution for managing resources and reducing fiscal deficits, but in fact, it is an integral part of an economic and social philosophy of governance. Key international actors now promote it aggressively without regard to its human rights implications or consequences, while most human rights bodies have either ignored the phenomenon or assumed that tweaking existing procedures provides an adequate response. Yet privatization often involves the systematic elimination of human rights protections and further marginalization of the interests of low-income earners and those living in poverty. Existing human rights accountability mechanisms are clearly inadequate for dealing with the challenges presented by large-scale and widespread privatization. Human rights proponents need to fundamentally reconsider their approach.

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I. Introduction[1]

1. Privatization is a process through which the private sector becomes increasingly, or entirely, responsible for activities traditionally performed by government, including many explicitly designed to ensure the realization of human rights. It can take many forms, ranging from the complete divestiture of government assets and responsibilities to arrangements such as public-private partnerships. By way of illustration, the latter might involve a medium- or long-term contractual arrangement, perhaps based on a concession or a lease, between a government and a private company. The company might build and/or run projects or services such as hospitals, schools, water, sanitation, prisons, roads, energy utilities or railways. Although the Government underwrites the project, risk is shared. In the health sector, privatization might involve multi-stakeholder partnerships, public-private initiatives or collaborations, private finance initiatives or demand-side financing.[2] In education, private schools might replace some or all government schools, or the Government might contract out certain functions, encourage charter schools, provide vouchers or import private sector techniques into the public sector.[3]

2. Since the 1970s, several waves of privatization have swept the world. In 2017, the Privatization Barometer concluded that "the massive global privatization wave that began in 2012 continues unabated".[4] That wave has been driven not only by Governments and the private sector, but also by international organizations, especially the International Monetary Fund (IMF), the World Bank and the United Nations. While some proponents present privatization as just "a financing tool",[5] others promote it as being more efficient, flexible, innovative and effective than public sector alternatives. In practice, however, privatization has also metamorphosed into an ideology of governance. As one advocate put it, "anything that strengthens the private sector [against] the State is protective of personal freedom".[6] Freedom is thereby redefined as an emaciated public sector alongside a private sector dedicated to profiting from running key parts of the criminal justice system and prisons, determining educational priorities and approaches, deciding who will receive health interventions and social protection, and choosing what infrastructure will be built, where and for whom.

3. This redefinition of the public good in terms of freedom from government, combined with the "liberation" provided by corporate efficiency and profitability, raises fundamental questions from a human rights perspective. Are private entities dedicated to maximizing their own profits best placed to protect the rights of the community? Is it possible to privatize vital services in such a way as to ensure that the most vulnerable are not further disadvantaged? If extensive conditions are required for that purpose, does that not undermine much of the rationale for privatization? How could corporations ensure the rights of the least well-off without

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[1] The Special Rapporteur is grateful to Anna Bulman for her excellent research for the present report.

[2] See Sonia Languille, "Public-private partnerships in education and health in the global South: a literature review", *Journal of International and Comparative Social Policy*, vol. 33, No. 2 (2017), p. 144.

[3] See Antoni Verger, Clara Fontdevila and Adrián Zancajo, "Multiple paths towards education privatization in a globalizing world: a cultural political economy review", *Journal of Education Policy*, vol. 32, No. 6 (2017), p. 757.

[4] See Privatization Barometer, *The PB Report 2015/2016* (2017), p. 4. Available at https://assets.kpmg.com/content/dam/kpmg/it/pdf/2017/01/ThePBReport2015-2016.pdf.

[5] See draft guiding principles on people-first public-private partnerships for the United Nations Sustainable Development Goals (ECE/CECI/WP/PPP/2017/CRP.1), p. 4.

[6] See Mitchel E. Daniels, "Reforming government through competition", in Reason Foundation, *Transforming Government through Privatization* (Los Angeles, California, 2006), p. 10.

undermining their own profitability? How can underfunded public entities effectively monitor the performance of diverse private companies even to ensure non-discrimination, let alone overall respect for human rights? What meaningful role can participation and accountability play when private corporations, operating on commercial principles, are taking key decisions affecting public welfare and individual rights? And how can international human rights accountability mechanisms play any significant role when privatization takes place within frameworks that exclude human rights considerations and when the private entities insist that they have no human rights obligations?

4. While responsibility for privatization lies primarily with Governments and the private sector, the main focus of the present report is on how the human rights community has responded to the large-scale transfer of power from the public to the private sector. To date, international and domestic human rights bodies have certainly criticized particular forms or examples of privatization, such as in the criminal justice sector, but overall they have chosen the path of agnosticism and assumed that tinkering with existing procedural safeguards will suffice to ensure favourable human rights outcomes. Most have thus failed to acknowledge or engage with the far-reaching implications of the view, expressed by the World Bank almost 30 years ago, that "there are virtually no limits on what can be privatized".[7] While the present report is especially concerned with the impact of privatization on the human rights of low-income persons and those living in poverty, that dimension can be meaningfully understood only in the broader context of the shift in values that privatization has brought about.

II. Defining privatization

5. Most definitions of privatization are of limited utility, because they fail to capture the deeper processes of value transformation that are at play. Narrowly conceived, privatization involves full divestiture, through which "all or substantially all the interests of a Government in a utility asset or a sector are transferred to the private sector", even if some form of governmental regulation or oversight is maintained.[8] More broadly, the term can cover any private sector involvement in public service provision.[9] The most expansive of definitions include not only tangible private involvement along a spectrum of contractual arrangements, but also organizational or ideological transformations of the public sector.[10] The private sector can become involved in or displace the public sector in various ways, including through ownership, financing, management, and service and/or product delivery.[11] Such involvement may be achieved through public-private partnerships,

[7] See Mary M. Shirley, "The what, why and how of privatization: a World Bank perspective", *Fordham Law Review*, vol. 60, No. 6 (1992), p. S24.

[8] See https://ppp.worldbank.org/public-private-partnership/agreements/full-divestiture-privatization; see also Organization for Economic Cooperation and Development (OECD), "Privatization in the 21st century: recent experiences of OECD countries — report on good practices" (2009).

[9] See Kate Bayliss and Elisa Van Waeyenberge, "Unpacking the public-private partnership revival", *Journal of Development Studies*, vol. 54, No. 4 (2018), p. 578.

[10] See Julien Mercille and Enda Murphy, "What is privatization? A political economy framework", *Environment and Planning A: Economy and Space*, vol. 49, No. 5 (May 2017), p. 1045.

[11] Ibid., p. 1041.

corporatization, [12] outsourcing, [13] divestiture or asset transfers. [14] Other terms sometimes used include "commercialization", "commodification" and "private sector participation". For the purposes of the present report, the Special Rapporteur uses the term in a broad generic sense.

III. The past and future of privatization

A. The past

6. Large-scale privatization was first championed by General Augusto Pinochet, President of Chile, in the early 1970s and then taken up by Margaret Thatcher, Prime Minister of the United Kingdom of Great Britain and Northern Ireland, after her election in 1979.[15] In the United Kingdom, the first national industries to be sold were in competitive markets, such as aerospace, road freight and storage, shipbuilding, oil, and council housing. By the mid-1980s, "natural monopolies", or public utilities such as rail, water, sewerage, electricity, gas and telecommunications, were sold. And in 1992, the private finance initiative was introduced as a means by which to rely on private investment to deliver a wide range of public sector services and infrastructure, in accordance with government specifications.

7. Internationally, privatization was promoted as an antidote to patronage through public sector employment and to reduce the size of government. It became a central feature of the programmes promoted in the post-communist States of Eastern Europe and, under the auspices of the Washington Consensus, spread to Africa, Latin America and Asia. Development finance and structural adjustment support were made conditional upon the transfer of ownership of "burdensome and inefficient public enterprises" to private companies. [16] Public utilities, especially in water and sanitation, were the subject of large-scale privatization.[17]

8. By the early 2000s, as the pitfalls of structural adjustment became more apparent, proponents of privatization talked less of downsizing the State and more about correcting market failures, creating markets and enabling the private sector to thrive. Public-private partnerships also emerged, especially in the infrastructure context, as a favoured mechanism.

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[12] Ibid., pp. 1046–1047 (corporatization is "the process whereby private or private-law-based organizations — such as State-owned companies or foundations — are established by a Government. They carry out functions that were previously managed in-house by the Government").

[13] Ibid., p. 1048 (outsourcing involves "the transfer of public services or goods provision to the private sector. Financing remains public and contracts are of shorter duration than in the case of public-private partnerships").

[14] Divestiture might involve selling to domestic or foreign firms or to managers or workers, an initial public offering in capital markets, or free distribution of shares to the population (mass privatization). See Saul Estrin and Adeline Pelletier, "Privatization in developing countries: what are the lessons of experience?" (2015), pp. 3 and 45.

[15] See David Parker, *The Official History of Privatization, vol. I: The Formative Years 1970–1987* (Abingdon, United Kingdom of Great Britain and Northern Ireland, Routledge, 2009); ibid., *vol. 2: Popular Capitalism, 1987–1997* (Abingdon, Routledge, 2012).

[16] See Sarah Babb, "The Washington Consensus as transnational policy paradigm", *Review of International Political Economy*, vol. 20, No. 2 (2013), p. 275.

[17] See Susan Spronk, "Water and sanitation utilities in the global south: re-centring the debate on 'efficiency'", *Review of Radical Political Economics*, vol. 42, No. 2 (2010), p. 156.

9. Another wave followed the global financial crash of 2007/8 and the resulting push for austerity and budget reductions.[18] Privatization generated funds for cash-strapped Governments, reduced liabilities, allowed major projects to be pursued "off-budget" without being reflected in government spending, and provided an occasion to push public sector reforms.[19]

10. The current wave of privatization emphasizes the concept of "blended finance", defined as "the use of development capital (from public sources like government aid or development banks, or philanthropic sources like foundations) to de-risk Sustainable Development Goal-related investments ... in order to attract commercial capital from private investors who would otherwise not have participated".[20] Whereas public-private partnerships are project-based and define the contractual relationship between the parties involved, "blended finance" refers to the sources of finance.[21] The role of the Government is in part to "provide a significant risk cushion".[22] In other words, corporations take the profits, but Governments will bear much of the losses if they are significant.

11. Assessing the extent to which privatization has occurred in global terms is difficult, if not impossible, given the wide variation among countries and sectors, and over time. Nonetheless, the World Bank's Private Participation in Infrastructure Database tracks projects in 139 low- and middle-income countries in the energy (electricity and gas), transport (airports, railways and roads), telecommunications, and water and sewerage sectors.[23] It currently lists 7,023 projects (management or lease contracts, concessions, greenfield projects and divestitures) representing $1,758 billion in total investment.[24] In the European Union, 1,749 public-private partnerships, worth some €336 billion, have been transacted since the 1990s, primarily in transport, health care and education.[25]

B. The future

12. There is a real risk that the waves of privatization experienced to date will soon be followed by a veritable tsunami. Some observers suggest that privatization, at least in some industries and sectors, is slowing down in the face of "remunicipalization".[26] In reviewing water policies at the global level, one author describes "the rise and part fall of privatization" and sees "a slow global turn to remunicipalization". Another

[18] See Isaac Christiansen, "Commodification of health care and its consequences", *World Review of Political Economy*, vol. 8, No. 1 (spring 2017), p. 87; and Daniel Edmiston, "Social security privatization in the UK: a means to whose end?", *People, Place and Policy*, vol. 8, No. 2 (2014), p. 114.

[19] See Nancy Alexander, "Globalization and the State's sovereign right to regulate in the public interest: the case of public-private partnerships (PPPs) in infrastructure", Heinrich Böll Stiftung, North America, 15 May 2017. Available at http://us.boell.org/2017/05/15/globalization-and-states-sovereign-right-regulate-public-interest-case-public-private.

[20] See Blended Finance Task Force, *Better Finance, Better World: Consultation Paper of the Blended Finance Task Force* (London, 2018), p. 10; see also OECD, "OECD DAC blended finance principles for unlocking commercial finance for the Sustainable Development Goals", January 2018.

[21] See Javier Pereira, "Blended finance: what it is, how it works and how it is used" (Oxford, United Kingdom, Oxfam, 2017).

[22] See Blended Finance Task Force, *Better Finance, Better World*, p. 9.

[23] See https://ppi.worldbank.org/data.

[24] See World Bank, PPI visualization dashboard, Private Participation in Infrastructure database, available at https://bit.ly/2tzrzpF.

[25] See European Court of Auditors, *Public-Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits* (Luxembourg, Publications Office of the European Union, 2018), p. 9.

[26] This involves the return of previously privatized services to delivery by the public sector.

study documented 235 cases of water remunicipalization in 37 countries between 2000 and 2015.[27] A later study of essential services such as energy, waste collection, transport, education, health and social services found 835 examples of remunicipalization, involving more than 1,600 cities in 45 countries.[28] Other commentators have also been encouraged by the renationalization of pension schemes in some countries.[29]

13. But any sense that privatization is now generally on the defensive is belied by the statistics and the programmes of the key international actors, which are surveyed below.

1. The United Nations

14. While the Sustainable Development Goals reflect a compromise between competing conceptions of the State as either a provider or a mere private sector facilitator,[30] subsequent developments have seen a significant emphasis on public-private partnerships, as illustrated in the private financing emphasis of the 2015 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (see General Assembly resolution 69/313, annex, paras. 5, 13, 14 and 17, inter alia).

15. The role of the United Nations in relation to privatization has been mixed. Some stakeholders have been highly critical,[31] but in its flagship report on global social policy, the United Nations does not even refer to the effects or implications of privatization.[32] In a recent Economic and Social Council report, it was noted that expertise on public-private partnerships within the United Nations was "relatively limited and rather scattered" (see ECE/CECI/WP/PPP/2017/CRP.1, p. 4). Within the Organization, the United Nations Conference on Trade and Development has been highly sceptical of privatization,[33] while the Economic Commission for Europe (ECE) has emerged as the leading proponent of public-private partnerships. In response to criticisms that the traditional public-private partnership model is unsuitable for promoting the Sustainable Development Goals and that it privatizes reward while socializing cost, ECE has called for an adapted and revised model of "people-first public-private partnerships", in the hope that these will eventually be supported by the whole United Nations system (see ECE/CECI/WP/PPP/2017/CRP.1, pp. 4 and 10). This model emphasizes poverty eradication, more equitable income allocation

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[27] See Satoko Kishimoto, Emanuele Lobina and Olivier Petitjean, eds., *Our Public Water Future: The Global Experience with Remunicipalization* (Amsterdam and others, Transnational Institute and others, 2015) p. 7. Available at www.tni.org/files/download/ourpublicwaterfuture-1.pdf.

[28] See Satoko Kishimoto and Olivier Petitjean, eds., *Reclaiming Public Services: How Cities and Citizens are Turning Back Privatization* (Amsterdam and Paris, Transnational Institute and others, 2017), p. 11. Available at www.tni.org/files/publication-downloads/reclaiming_public_services.pdf.

[29] See Carmelo Mesa Lago, *Reversing Pension Privatization: The Experience of Argentina, Bolivia, Chile and Hungary*, Extension of Social Security Working Paper, No. 44 (Geneva, International Labour Office, 2014). Available at www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=53192.

[30] See Jens Martens, "Reclaiming the public (policy) space for the SDGs: privatization, partnerships, corporate capture and the implementation of the 2030 Agenda", in Barbara Adams and others, eds., *Spotlight on Sustainable Development 2017: Reclaiming Policies for the Public* (Rheinbreitbach, Germany, Medienhaus Plump, 2017), p. 11.

[31] See United Nations, Department of Economic and Social Affairs, "Blended finance in the SDG era", technical workshop on the margins of the 5th biennial high-level meeting of the Development Cooperation Forum, New York, 20 July 2016.

[32] *Promoting Inclusion through Social Protection: Report on the World Social Situation 2018* (United Nations publication, Sales No. E.17.IV.2).

[33] See *Trade and Development Report 2017: Beyond Austerity — Towards a Global New Deal* (United Nations publication, Sales No. E.17.II.D.5).

and meaningful dialogue with stakeholders.[34] When ECE addresses human rights, it is generally in relation to the non-binding Guiding Principles on Business and Human Rights or to underscore that respect for property rights is essential.

2. Business

16. While no group speaks for the private sector as a whole, the Business and Sustainable Development Commission brings together many of the titans of global business and has taken a leadership role in promoting privatization. In a major report designed to push back against "unaccountable globalization" and perceptions that big business and major financial institutions are "detached and rootless", the Commission focuses on the Sustainable Development Goals as a business opportunity, arguing that they "offer a compelling growth strategy for individual businesses, for business generally and for the world economy" and will not be achieved without business.[35] The Commission states that "poverty, inequality and lack of financial access [should be turned] into new market opportunities for smart, progressive, profit-oriented companies", although it avoids using the word "privatization".[36] It does, however, make many references to rights, usually in relation to the Guiding Principles. It even calls for a "social contract" to achieve "the global goals that meet basic needs and protect human rights (the social goals)", although no definition of "social goals" is offered.[37]

17. A second report, by the Commission's Blended Finance Task Force, presents blended finance as the key to achieving the Sustainable Development Goals. The argument, echoed by ECE, the Organization for Economic Cooperation and Development (OECD) and the World Bank, is that there is an "investment gap" of between $2 trillion and $3 trillion a year that can best be filled by blended finance initiatives in order to meet Sustainable Development Goal targets. Since least developed countries currently receive only 7 per cent of the total of such initiatives, the Task Force seeks a dramatic increase. It thus calls upon: institutional investors "to support Sustainable Development Goal investments in line with their fiduciary duty"; philanthropic foundations to use their resources to support blending; developed countries to use their official development assistance for this purpose; multilateral development banks and development finance institutions to greatly increase their collaboration with the private sector; and developing countries to "prioritize strong enabling environments ... for infrastructure investment".[38] The report notes that, in an industry survey, 70 per cent of institutional investors reported historical profit margins of between 12 per cent and 17 per cent on infrastructure investments.[39] On top of that, blended finance further reduces private sector risk through the mobilization of intergovernmental and governmental finance and guarantees.

3. The International Monetary Fund

18. Privatization has long been a key part of the agenda of IMF.[40] Although the Fund claims to have introduced major changes to some of its Washington Consensus-era policies, the emphasis on the privatization of a range of public sector enterprises and

[34] See "Implementing the United Nations 2030 Agenda for Sustainable Development through effective, people-first public-private partnerships" (ECE/CECI/WP/PPP/2017/CRP.9), p. 3.

[35] See Business and Sustainable Development Commission, *Better Business, Better World* (London, 2017), p. 11.

[36] Ibid., p. 7.

[37] Ibid., p. 82.

[38] See Blended Finance Task Force, *Better Finance, Better World*, p. 92.

[39] Ibid., p. 9.

[40] See Jonathan D. Ostry, Praksh Loungani and Davide Furceri, "Neoliberalism: oversold?", *Finance and Development*, vol. 53, No. 2 (June 2016), p. 38.

activities continues to feature prominently in the advice given to Governments and in the conditions attached to its loans.

19. A review of the 10 most recent article IV staff reports dealing with countries in Africa shows that IMF was actively advocating privatization in six cases, while in virtually all of the others the Governments themselves noted their commitment to public-private partnerships and related projects.[41]

4. The World Bank

20. In 2015, the World Bank promoted the concept of increasing private sector financing "from billions to trillions" to meet the Sustainable Development Goals.[42] In 2017, it announced its "Maximizing Finance for Development" agenda, which "prioritizes private financing and sustainable private sector solutions" to achieve the Sustainable Development Goals by 2030.[43] Using a "cascade approach", the Bank seeks to "crowd the private sector in" and to "reserve scarce public financing for those areas where private sector engagement is not optimal or available". In effect, profitable enterprises will be reserved to the private sector, while unprofitable activities will be publicly financed.[44] The voluminous materials promoting this entirely one-sided solution to development financing make no mention of the human rights implications of the resulting public/private division of labour, and the implications for those living in poverty are given short shrift.

5. The Group of 20

21. The Group of 20 has also promoted a range of strategies designed to dramatically increase private sector involvement in development finance.[45]

IV. Justifications versus outcomes

22. Privatization has been supported on many and varied grounds. Proponents portray the private sector as being more efficient, more capable of mobilizing finance, more innovative, able to relieve the Government of much of the risk and to negotiate cheaper and more predictable construction costs, and better able to capitalize on economies of scale and minimize running costs. They claim that, as a result, it can generate strong profits, ensure better quality, provide enhanced maintenance, be more flexible and avoid the rigidities and inefficiencies of government-type bureaucracy. Ostensibly, the benefits outweigh the higher financial cost of private (as opposed to public) sector financing.

23. There is, however, a striking disconnect between this idealized narrative and the findings contained in many of the theoretical and empirical studies on the subject. In terms of theory, economists such as Joseph Stiglitz have argued that the "case for

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[41] As at 10 July 2018, the first group consisted of Algeria, Angola, Côte d'Ivoire, Mali, Mozambique and Nigeria. The second group consisted of the Comoros, the Gambia, Liberia and Malawi.

[42] See World Bank and others, "From billions to trillions: transforming development finance — post-2015 financing for development: multilateral development finance", 2 April 2015. Available at http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23659446/DC2015-0002(E)FinancingforDevelopment.pdf.

[43] See http://ieg.worldbankgroup.org/blog/creating-markets-are-ppps-answer.

[44] See World Bank, "Maximizing finance for development: leveraging the private sector for growth and sustainable development", 19 September 2017, p. 1. See, generally, Tito Cordella, "Optimizing finance for development", Policy Research Working Paper, No. 8320 (Washington, D.C., World Bank, 2018).

[45] See Nancy Alexander, "The hijacking of global financial governance?", Heinrich Böll Stiftung, North America, 23 April 2018. Available at https://us.boell.org/2018/04/23/hijacking-global-financial-governance.

privatization is, at best, weak or non-existent",[46] and many empirical studies have also generated critical results.[47]

24. A brief report to the General Assembly is not the place to provide a thorough survey of the many studies of privatization outcomes, let alone to seek to resolve the debates surrounding them. It is, however, important to make the point that the arguments that are systematically invoked to justify privatization are often challenged or contradicted by the available evidence. For the purposes of the present report, it must suffice to take note of the results of two very recent detailed official studies. While both are focused on industrialized countries, the challenges are even greater in "poor and fragile countries".[48]

25. The first study, conducted by the National Audit Office of the United Kingdom, concluded that the private finance initiative model had proved to be more expensive and less efficient in providing hospitals, schools and other public infrastructure than public financing.[49] The second study, conducted by the European Court of Auditors of the European Union, examined 12 public-private partnerships in France, Greece, Ireland and Spain, in road transport and information and communications technology. It concluded that the partnerships were characterized by "widespread shortcomings and limited benefits".[50]

26. In terms of costs, private finance is more expensive than public finance, and public-private partnerships can also incur high design, management and transactional costs due to their complexity and the need for external advice.[51] In addition, negotiations on issues other than traditional procurement can cause project delays of some years.[52] The European Union study found "considerable inefficiencies in the form of delays during construction and major cost increases".[53]

27. Similar findings emerged from a review of public-private partnerships in health and education in Africa, Asia and Latin America that pointed to high public costs, and onerous ongoing administrative burdens for the public sector.[54] The United Kingdom study warned of private entities charging high prices to cover unforeseen costs, and of escalating prices as negotiations dragged on, leading to "significant capital cost increases compared to initial estimates."[55] There is also a problematic pattern of contractors bidding low initially and then increasing tariffs through contract

[46] See Joseph E. Stiglitz, Foreword, in Gérard Roland, ed., *Privatization: Successes and Failures* (New York, Columbia University Press, 2008), p. xii.

[47] See Bernardo Bortolotti and Valentina Milella, "Privatization in Western Europe: stylized facts, outcomes and open issues", in Roland, *Privatization*, p. 32; David Parker and David Saal, eds., *International Handbook on Privatization* (Edward Elgar Publishing, 2003), p. 3; and Malcolm Langford, "Privatization and the right to water", in Malcolm Langford and Anna F. S. Russell, eds., *The Human Right to Water: Theory, Practice and Prospects* (Cambridge, United Kingdom, Cambridge University Press, 2017), p. 502.

[48] See David Pilling, "World Bank set for Uganda dam refinancing talks despite criticism", *Financial Times*, 7 March 2018.

[49] See United Kingdom, National Audit Office, *PFI and PF2*, report by the Comptroller and Auditor General (London, 2018).

[50] See European Court of Auditors, *Public-Private Partnerships in the EU*.

[51] See Languille, "Public-private partnerships in education and health in the global South", p. 156; and Germà Bel and Xavier Fageda, "What have we learned from the last three decades of empirical studies on factors driving local privatization?", *Local Government Studies*, vol. 43, No. 4 (2017), pp. 503–511.

[52] See European Court of Auditors, *Public-Private Partnerships in the EU*, p. 9.

[53] Ibid., p. 10.

[54] See Languille, "Public-private partnerships in education and health in the global South", p. 156.

[55] See United Kingdom, National Audit Office, *PFI and PF2*, p. 9.

renegotiation.[56] This is consistent with the European Union finding of "over-optimistic scenarios regarding future demand and use of the planned infrastructure".[57]

28. In terms of efficiency, the United Kingdom study found "no evidence of operational efficiency" in private finance initiative hospitals and concluded that "the cost of services, like cleaning, in London hospitals is higher under private finance initiative contracts".[58] The Department of Education of the United Kingdom reported that private project financing costs were 40 per cent higher than the costs of government borrowing, while a Treasury Committee analysis estimated the costs of a privately financed hospital to be 70 per cent higher than those of a public sector hospital.[59]

29. The privatization of public projects and services often yields significant short-term cost savings, but at the expense of imposing major burdens on future generations. Removing the relevant costs from the Government's balance sheet undermines both "value for money and transparency"[60] and has been criticized as a "fiscal illusion".[61]

30. The European Union and United Kingdom studies also raise other concerns that warrant brief mention here: (a) conflicts between public concerns over the quality of life and the private sector's preoccupation with profitability;[62] (b) the difficulty of avoiding windfall returns to the private sector, while compensating for unanticipated losses through renegotiations;[63] (c) private sector entities structured to minimize or avoid taxes on profits;[64] (d) a lack of competition in privatized project design and selection;[65] (e) the risk of private monopolies; (f) the misallocation of risk between parties and excessive remuneration rates to private companies;[66] and (g) inflexible long-term contracts that can leave Governments with expensive "white elephants".[67]

V. Human rights impacts

31. Privatization arrangements are rarely conducive to human rights impact assessments. First, human rights criteria are systematically absent from almost all such agreements. Second, sustained monitoring is rarely undertaken on issues such as the impact on the poor, access to services and service quality.[68]

32. But available reports attest to innumerable ways in which those living in poverty or on low incomes can be negatively affected by privatization. For the purposes of the present report, a few examples must suffice.

33. As aspects of criminal justice systems are privatized, many different charges and penalties are levied with far greater impact on the poor, who then must borrow to pay them or face default. The quality of the services that they can afford diminishes, and their prospects of obtaining justice recede even further (see A/HRC/38/33/Add.1).

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[56] See J. Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing It Right*, WBI Development Studies, No. 28816 (Washington, D.C., World Bank 2004), p. 81.
[57] See European Court of Auditors, *Public-Private Partnerships in the EU*, p. 10.
[58] See United Kingdom, National Audit Office, *PF1 and PF2*, para. 1.9.
[59] Ibid., para. 1.19.
[60] See European Court of Auditors, *Public-Private Partnerships in the EU*, p. 11.
[61] See United Kingdom, National Audit Office, *PF1 and PF2*, para. 1.16.
[62] See Edmiston, "Social security privatization in the UK", p. 119.
[63] See United Kingdom, House of Commons, Committee of Public Accounts, "Private finance initiatives", June 2018, p. 5.
[64] Ibid., p. 6.
[65] See European Court of Auditors, *Public-Private Partnerships in the EU*, pp. 9–10.
[66] Ibid., p. 10.
[67] See United Kingdom, National Audit Office, *PF1 and PF2*, para. 1.21.
[68] See para. 82 below.

Prisoners are at the mercy of profit-seeking private operators, and corporations become highly influential in shaping public policies that reflect corporate interests rather than the public interest.

34. The privatization of social protection often results in the poor being "relegated to a new even more underfunded public sector".[69] The model of training social workers to recognize the inherent fragility of the human condition and identify the specific social, psychological, economic and even structural challenges faced by individuals is replaced by a model that is driven by economic efficiency concerns and is aimed at minimizing the time spent per client, closing cases earlier, maximizing outputs in formal but not human terms, generating fees wherever possible and thus catering especially to the better-off, and minimizing reporting and follow-up.[70]

35. Social security systems are increasingly being privatized, which is leading to service outsourcing, social insurance marketization, commercializing administrative discretion and paying by results.[71] These approaches empower private for-profit actors to make determinations about the needs and capacities of individuals, incentivize them to do so within a corporate rather than a public goods framework, and reward spending reductions rather than the achievement of positive human outcomes. The poor inevitably suffer as "preferential selection" approaches are used to prioritize clients with the most readily treatable problems and those who can afford to pay, while pushing those with serious or intractable problems to the margins. Such privatized care is also especially susceptible to racial and other forms of discrimination.

36. Infrastructure projects will be most attractive to private providers where significant user fees can be charged and construction costs are relatively low.[72] But the poor are badly placed to pay, cannot afford to use many services, and often live in distant or otherwise underserviced areas. Water, sanitation, electricity, roads, transport, education, health care, social services and financial services are far less likely to be provided adequately or at good quality levels to the poor. Instead, such persons either go without those services or pay even higher prices for substitute services. For example, as expensive toll roads proliferate, the poor make do with inferior, badly maintained and increasingly marginalized alternative options.

37. Many other examples could be cited. The response of privatization proponents to such concerns will generally be that pro-poor adjustments should have been more effectively built into the relevant policies or projects, and that enhanced monitoring and accountability mechanisms could have achieved more optimal outcomes. In other words, there is nothing inherently wrong with the process, but it could have been done better. The Special Rapporteur analyses those and other traditional solutions below.[73]

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[69] See Shiri Noy, *Banking on Health: The World Bank and Health Sector Reform in Latin America* (Cham, Switzerland, Springer Nature, 2017), pp. 18–19.

[70] See Mimi Abramovitz and Jennifer Zelnick, "Privatization in the human services: implications for direct practice", *Clinical Social Work Journal*, vol. 43, No. 3 (September 2015), p. 283. Available at https://link.springer.com/content/pdf/10.1007%2Fs10615-015-0546-1.pdf.

[71] See Edmiston, "Social security privatization in the UK", p. 114; and Taner Akpınar and Servet Akyol, "Political economy of transforming social security policy in Turkey", *World Review of Political Economy*, vol. 9, No. 1 (spring 2018), p. 80.

[72] See Office of the United Nations High Commissioner for Human Rights and Heinrich Böll Foundation, *The Other Infrastructure Gap: Sustainability — Human Rights and Environmental Dimensions* (2018).

[73] See World Bank, *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02-12* (Washington, D.C., 2015), p. 100.

VI. The human rights community and privatization[74]

38. In a 2017 report of the Secretary-General and the United Nations High Commissioner for Human Rights, it was stated that privatization in key sectors "must not take place at the expense of equitable access to these services and the protection of human rights, and should be subject to human rights impact assessments" (see A/HRC/36/23, para. 55). But for the most part, the human rights community has engaged with privatization only in relation to certain specific issues, rather than in general. And United Nations human rights bodies, which tend to downplay or avoid the political economy dimensions of human rights, have also done that in relation to privatization, despite its major impact in many human rights contexts.

A. Treaty bodies

39. Scholars who have surveyed the work of treaty bodies have concluded that most have engaged in only a rather limited and not especially convincing way with the multiple issues raised by privatization.[75] The principal exceptions are the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights. The former has consistently acknowledged the relevance of privatization and has insisted that outsourcing or privatizing services for children does not exempt a State from its obligations under the Convention on the Rights of the Child.[76]

40. The general comments of the Committee on Economic, Social and Cultural Rights have regularly, although not consistently, addressed the role and responsibilities of private actors. A high point in this jurisprudence was the Committee's statement that where water services "are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water".[77] While some scholars have praised the diverse techniques used by the Committee to address privatization,[78] others have criticized it for not engaging with "privatization forms, processes, outputs, outcomes and rights impacts in depth in its general comments or other work" and have concluded that its concluding observations on the subject, with the exception of those on the right to education, have been "largely ad hoc".[79] The right to education is, nevertheless, a key battleground on this issue.[80]

41. In 2017, however, the Committee on Economic, Social and Cultural Rights adopted a general comment in which it addressed privatization in considerable detail. In essence, its position consists of the following elements: (a) "privatization is not per se prohibited by the International Covenant on Economic, Social and Cultural

[74] For a detailed survey of privatization and the practice of human rights monitoring mechanisms, see Antenor Hallo De Wolf, *Reconciling Privatization with Human Rights* (Intersentia, 2012), chap. V.

[75] See Aoife Nolan, "Privatization and economic and social rights", *Human Rights Quarterly*, vol. 4, No. 4 (forthcoming). Available at http://eprints.nottingham.ac.uk/50113/1/Nolan_Privatization%20%20ESR_HRQ_sharing.pdf; and De Wolf, *Reconciling Privatization with Human Rights*.

[76] See Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, para. 25.

[77] See Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, para. 24.

[78] See Langford and Russell, eds., *The Human Right to Water*, p. 473.

[79] See Nolan, "Privatization and economic and social rights", p. 15.

[80] See Global Initiative for Economic, Social and Cultural Rights, "Human rights bodies statements on private education, September 2014–November 2017", synthesis paper, ver. 9., November 2017. Available at http://globalinitiative-escr.org/wp-content/uploads/2016/10/GIESCR-CRC_CESCR_CEDAW-synthesis-statements-on-private-actors-in-education.pdf.

Rights"; (b) "in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong ... private providers should ... be subject to strict regulations that impose on them so-called 'public service obligations'"; (c) private sector provision might lead to less affordable and lower quality goods and services; (d) privatization should not result in the enjoyment of rights set out in the Covenant being "made conditional on the ability to pay"; and (e) since privatization "may result in a lack of accountability, measures should be adopted to ensure the right of individuals to participate in assessing the adequacy of the provision of such goods and services".[81]

B. Special procedures

42. Many special procedures mandate holders have touched on privatization. In relation to economic, social and cultural rights, the mandates relating to water and sanitation, housing, foreign debt, education and health have all expressed concerns. One of the stronger criticisms has concerned the exclusion of the disadvantaged from access to private schools, which "aggravates existing disparities in access to education, further marginalizing the poor" (see A/HRC/29/30, para. 43). Civil and political rights mandates have also raised explicit concerns, especially in the context of executions, torture, mercenaries and business. At the risk of overgeneralization, the main thrust has been to point to lower standards that have resulted from privatization in the security, health, policing, detention, intelligence and other sectors, to call upon the relevant Government to ensure that appropriate standards are maintained by private entities, and to insist that States' obligations are not affected by the act of privatizing the relevant activities.

C. Scholars

43. There is an extensive literature on privatization and its human rights implications. Most commentators accept the basic principle of privatization, draw attention to its shortcomings in practice and call for measures to regulate it more effectively.

44. In an important recent book, Manfred Nowak argues that privatization is contrary to international human rights law to the extent that it involves any deliberate regression in the level of services provided in relation to "core governmental functions", including "education, social security, water, personal liberty, security, dignity and integrity". Thus, for example, in the administration of justice, "far-reaching privatization ... will make it very difficult, if not impossible, for States" to respect human rights.

45. However, he also identifies a range of other sectors ("industry; banks; means of transport, including railways, airlines, ports and roads; means of communication, including postal and telecommunications services") in relation to which "privatization has led to more efficiency and has had no direct positive or negative impact on the enjoyment of human rights".[82] But this neat classification is problematic for several reasons. First, no convincing criteria are offered for the identification of the various sectors. Second, a blanket assessment of acceptable privatizations is made without looking at the specifics in any given context. Third, account is not taken of evidence

[81] See Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, paras. 21–22.

[82] See Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (Philadelphia, University of Pennsylvania, 2017), p. 3.

that privatization has brought about negative consequences, at least for low-income groups, in many of the sectors for which he approves of privatization. And fourth, the analysis stretches the concept of deliberate retrogression to its breaking point, rather than relying on the positive obligations assumed by States.

46. Another scholar, Aoife Nolan, focuses specifically on the impact of privatization on economic and social rights. She considers privatization to be permissible, provided it is properly implemented and achieves appropriate outcomes. She emphasizes the central and enduring obligations of the State "before, during and after privatization"[83] and criticizes various authors, especially the Committee on Economic, Social and Cultural Rights, for evaluating privatization primarily through the lens of the State's obligation to protect rather than the more broad-ranging obligation to fulfil the enjoyment of the relevant rights.[84]

D. Civil society

47. Privatization has long been a major concern of civil society, most recently in relation to the Sustainable Development Goals. In one report on that topic, it was concluded that "privatization and public-private partnerships involve disproportionate risks and costs for the public sector and can even exacerbate inequalities, decrease equitable access to essential services and jeopardize the fulfilment of human rights",[85] but the response of groups working on human rights has been very mixed. At the national level, this view has gained some prominence,[86] as illustrated by a detailed complaint submitted in 2018 to the Office of the Compliance Adviser/Ombudsman of the International Finance Corporation in relation to privatized education in Kenya.[87] Among the larger international non-governmental organizations, the International Federation for Human Rights has often raised the issue of privatization in country-level reporting, but the Federation makes no particular mention of it in its major publication on corporate accountability.[88] Human Rights Watch has been staunchly critical of its implications in particular areas, such as criminal justice, immigration detention and information technology, but has no overall policy on privatization. The Global Initiative for Economic, Social and Cultural Rights includes a wide-ranging project on privatization in education[89] and is involved in drafting standards on that subject.[90]

48. There have been several attempts to develop overall policy statements, including one by the International Network for Economic, Social and Cultural Rights focused on public-private partnerships[91] and another by Amnesty International, which has

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[83] See Nolan, "Privatization and economic and social rights", p. 12.

[84] Ibid., pp. 18–20.

[85] See Adams and others, *Spotlight on Sustainable Development 2017*, p. 11.

[86] See, generally, www.business-humanrights.org/en/issues/other/privatisation.

[87] See Judith Oloo, Regional Director, East Africa Centre for Human Rights, "Submission of complaint concerning the Bridge International Academies", 16 April 2018. Available at http://eachrights.or.ke/wp-content/uploads/2018/04/CAO-Complaint-EACHRights-16-April-18-Public.pdf.

[88] International Federation for Human Rights, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms*, 3rd ed. (Paris, 2016).

[89] See http://globalinitiative-escr.org/advocacy/privatization-in-education-research-initiative/international-advocacy-on-privatisation-in-education/.

[90] See Global Initiative for Economic, Social and Cultural Rights, "Human rights guiding principles on the State obligations regarding private schools", draft 2018. Available at https://www.gi-escr.org/private-actors-social-services/education/human-rights-guiding-principles/.

[91] International Network for Economic, Social and Cultural Rights, "Privatization and public-private partnerships", briefing note, 2016. Available at www.escr-net.org/sites/default/files/1169911442/privatisation_briefing_note_english.pdf.

cautioned that privatization "can be a barrier to universal access if not properly regulated" and that a failure by the State to protect economic, social and cultural rights "can result in violations of rights ..., particularly for the poorest and most marginalized". It has criticized cost recovery approaches in housing and health, which "can have gendered and indirectly discriminatory consequences ... even if substantially subsidized".[92] While that analysis did not identify solutions, an earlier report had listed seven "human rights principles concerning delivery of essential services". They are: ensure that rights are protected; establish a clear and transparent regulatory framework; ensure that access to services is maintained; uphold the principle of non-discrimination; assess impact; ensure that the privatization process is open, fair and transparent; and ensure a safety net that requires privatized entities "to guarantee access to all, particularly the poor, marginalized, vulnerable and disadvantaged individuals and groups".[93]

49. At the risk of overgeneralization, the bottom line is that human rights groups as a whole have done little to tackle the broader systemic implications of privatization and have relied on reiterating doctrinal positions in the face of compelling evidence that such approaches are not working.

VII. The principal mitigation techniques and their inadequacies

50. The consistent response when the pitfalls of privatization are exposed is to propose techniques that will supposedly mitigate the negative consequences. The following analysis evaluates the principal techniques.

A. Characterizing certain activities as inherently public

51. Analysts commonly seek to identify services that are inherently public in nature and thus must always be guaranteed (whether or not provided) by the State. Even Adam Smith, an enthusiastic proponent of privatization, singled out certain activities that should remain the responsibility of the State, including the post office and national infrastructure, such as "good roads, bridges, navigable canals, harbours".[94] Although courts have occasionally characterized activities such as the operation of prisons as inherently governmental in nature,[95] the identification of criteria by which to separate inherently public activities from others that might be privatized has proved to be very elusive. Despite the appeal of the concept, the reality is that an almost limitless range of public functions has been entrusted to profit-making corporations in one jurisdiction or another, and human rights bodies have rarely condemned such transfers outright.

52. A milder form of this approach is to suggest that, as a rule or in principle, certain activities should be undertaken by the State.[96] But again, this technique has failed to significantly limit the reach of privatization in practice.

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[92] Amnesty International, *Theory of Change Summaries 2016–2019* (2016), p. 19. Available at www.amnesty.org/download/Documents/POL1031652016ENGLISH.PDF.

[93] Amnesty International, "Human rights and privatization", 17 March 2005.

[94] See David A. Reisman, "Adam Smith on market and State", *Journal of Institutional and Theoretical Economics*, vol. 154, No. 2 (June 1998), p. 375.

[95] See High Court of Justice, Israel, *Academic Centre for Law and Business v. Minister of Finance*, Case No. 2605/05, 19 November 2009.

[96] In relation to privately run detention centres, see Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 39.

B. Assimilating the private actor into the State

53. Various commentators and United Nations human rights bodies have sought to circumvent the impact of privatization by asserting either that personnel working for private actors are nonetheless "acting in an official capacity"[97] and must thereby comply with State obligations, or that "States parties cannot absolve themselves of their human rights obligations by contracting out [specific functions] to private commercial enterprises".[98] But while these techniques enable the relevant monitors to avoid acknowledging that the reality has fundamentally changed as a result of privatization, they do little to constrain the preferences of States or uphold authentic human rights accountability.

C. Detailed regulation

54. The next technique is to insist that States must adopt detailed regulations governing privatized providers. Thus, for example, the Committee on Economic, Social and Cultural Rights urged that, in order to prevent private providers "from compromising equal, affordable and physical access to sufficient, safe and acceptable water ... an effective regulatory system must be established, in conformity with the Covenant".[99] Some scholars have gone even further, suggesting that "the more a State delegates its responsibilities to fulfil to a non-State actor, the greater its duty to protect".[100] In some sectors, such as water and prisons, such regulation has been attempted and has sometimes been effective.[101] But, for the most part, there is little evidence to suggest that privatization in most sectors and in most countries has been undertaken under conditions that resemble the sort of detailed obligations that human rights law would have imposed upon a governmental provider.

D. In-depth monitoring

55. Many human rights bodies and commentators insist that full-fledged monitoring of privatized providers must be put in place. The Committee on the Rights of the Child has called for "a permanent monitoring mechanism or process aimed at ensuring that all non-State service providers have in place and apply policies, programmes and procedures which are in compliance with the Convention".[102] The Committee on Economic, Social and Cultural Rights has called for "independent monitoring, genuine public participation and imposition of penalties for non-compliance".[103] And the Secretary-General has suggested that there is a need for human rights impact assessments of privatized providers (see A/HRC/36/23, para. 55). There is little indication, however, that human rights bodies have done much to ensure that such monitoring actually occurs, or to reprimand States when it does not.

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[97] See Committee against Torture, general comment No. 2 (2007) on the implementation of article 2.

[98] See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2 (2013), para. 39.

[99] See Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, para. 24.

[100] See Sharmila L. Murthy, "The human right(s) to water and sanitation: history, meaning and the controversy over privatization", *Berkeley Journal of International Law*, vol. 31, No. 1 (2013), p. 142.

[101] See Langford and Russell, eds., *The Human Right to Water*.

[102] Ibid.

[103] See Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), para. 24.

E. Guidelines and more guidelines

56. Institutions and commentators consistently emphasize the importance of developing guidelines to ensure that public-private partnerships achieve the full range of desired objectives.[104] But in fact, truckloads of guidelines have already been adopted, and most ignore human rights in any comprehensive sense and pay scant regard to the negative outcomes that privatization can have in terms of poverty and inequality. A recent review of 12 sets of guidelines found that they focus mainly on transactional aspects, overlook gender concerns [105] and ignore other relevant environmental and social safeguard policies.[106]

57. While the 2008 guidelines of the Asian Development Bank guidelines include a chapter on pro-poor aspects, it is directed mainly at the donor community. A recent ECE initiative calls for the development of a model law on public-private partnerships that would "be responsive to gender" and would "allow for redress where rights of peoples are harmed by public-private partnerships" (see ECE/CECI/WP/PPP/2017/CRP.1, p. 19).

58. The highly influential World Bank Guidance on Public-Private Partnership Contractual Provisions contains several references to human rights, but only one is substantively significant in terms of encouraging private contractors to promote or even respect human rights. That is a footnote that justifies the importance of transparency and disclosure by referring to the right to freedom of information.[107] The Guidance does not even refer to the Guiding Principles on Business and Human Rights. It does, however, specify that the applicable law "should be limited to obligations with which the private partner must legally comply", including "international human rights or environmental treaties that are directly applicable in the respective jurisdiction or have been incorporated into its national law".[108] This appears to be formulated in such a way as to ensure that private providers would almost never have to comply with human rights, since such an obligation is almost never imposed by Governments. The Guidance also seems to require that human rights standards actually be specified in a contract if they are to be applicable.[109]

59. In an analysis carried out by a law firm, it was concluded that the Guidance emphasizes "the preferences and requirements of the private sector partner without commensurate consideration of the perspective of the Government" and "places disproportionate risk on Governments". The analysis also included the warning that inappropriate risk allocation can result in additional government debt or diversion of

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[104] See Jomo KS and others, "Public-private partnerships and the 2030 Agenda for Sustainable Development: fit for purpose?", DESA working paper, No. 148 (New York, United Nations, Department of Economic and Social Affairs, 2016), p. 22. Available at www.un.org/esa/desa/papers/2016/wp148_2016.pdf.

[105] For an excellent survey, see the report of the Independent Expert on the effects of foreign debt (A/73/179).

[106] See Motoko Aizawa, "A scoping study of PPP guidelines", DESA working paper, No. 154 (New York, United Nations, Department of Economic and Social Affairs, 2018). The 12 guidelines were adopted by: Asian Development Bank (ADB) (2008); ADB, International Bank for Reconstruction and Development and Islamic Development Bank (2014); European Investment Bank (2011); European Commission (2003); International Monetary Fund (2006); OECD (2008); OECD (2012); Economic Commission for Europe (ECE) (2008); ECE (2016); Economic and Social Commission for Asia and the Pacific (2011); World Bank (2015); and World Bank (2016).

[107] See World Bank, *Guidance on PPP Contractual Provisions*, 2017 ed. (Washington, D.C., 2017), note 50.

[108] Ibid., para. 3.2.2.1.

[109] Ibid., note 32 ("If the parties agree the private partner should comply with institutional or industry standards or principles which are not legally binding, the PPP contract would typically specify the relevant version to be complied with ...").

resources from essential services to compensation which may be due even when a Government "changes the law as part of a bona fide, non-discriminatory effort to regulate environmental and social issues in the public's interest".[110]

F. Pro-poor interventions

60. Various solutions have been identified to mitigate risks to the poor, including "dialogue with partner Governments", "thorough poverty and social impact analysis", "provision of fair and affordable financial support for social safety nets", "tracer studies to monitor the long-term impact on affected workers", "tariff reform measures" and "direct subsidies or cross-subsidies to promote access by poorer groups within an affordable strategy".[111] The World Bank has an entire webpage devoted to such interventions.[112] Yet there remains remarkably little evidence that these recommendations been effectively implemented and maintained beyond the initial phase of securing approval.

61. The Economic and Social Commission for Asia and the Pacific (ESCAP) has a Pro-Poor Public-Private Partnership, but few details of any successes have been provided,[113] and the "people-first" public-private partnerships of ECE purportedly seek to "increase access of essential services to people, especially to the socially and economically vulnerable ... promote social justice and make essential services accessible without restriction on any ground".[114] This seems impossibly optimistic, given that few, if any, profit-seeking corporations see the provision of social justice and accessible essential services for all without any restriction to be their role or goal.

G. Ensuring broad participation in decision-making

62. Under the same ECE approach, it is insisted that public-private partnerships need to engage "all the stakeholders that are either directly involved ... or directly or indirectly affected".[115] Participation has long been a magic elixir for those seeking to ensure development outcomes that are consistent with respect for human rights. The Guiding Principles on Extreme Poverty and Human Rights go so far as to require States to "ensure the active, free, informed and meaningful participation of persons living in poverty at all stages of the design, implementation, monitoring and evaluation of decisions and policies affecting them" (see A/HRC/21/39, para. 38).

63. Whether or not this is realistic in public sector contexts, such participatory utopias could hardly be further from the reality experienced in the context of most privatization processes, in which decision-making effectively becomes the privilege of the private sector actor. Moreover, even in relation to those decisions that remain in public hands, the private sector is increasingly and unsurprisingly insistent upon being directly involved.

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[110] See Foley Hoag, "Summary comments on the World Bank Group's 2017 *Guidance on PPP Contractual Provisions*", 15 September 2017. Available at https://us.boell.org/2017/09/15/summary-comments-world-bank-groups-2017-guidance-ppp-contractual-provisions-0.

[111] See Estrin and Pelletier, *Privatization in Developing Countries*, pp. 42–43.

[112] See https://ppp.worldbank.org/public-private-partnership/ppps-poor.

[113] See www.unescap.org/5P.

[114] See Specialist Centre on PPP in Smart and Sustainable Cities, "Draft proposal for an evaluation methodology for 'people-first' public-private partnerships", April 2018. Available at www.unece.org/fileadmin/DAM/ceci/documents/2018/PPP/Forum/Documents/Draft_Proposal_for_Evaluation_Methodology_for_People_First_PPPs.pdf.

[115] Ibid.

64. In other contexts, civil society is simultaneously being attacked and marginalized. Even in relation to the Sustainable Development Goals, with respect to which a great deal has been made of multi-stakeholder involvement, the reality is that civil society organizations are accorded an ever-diminishing role, while public-private partnerships consume much of the energy surrounding the process. Privatization is driving these developments. Civil society organizations are relevant primarily in contexts in which governmental actors can be persuaded, cajoled or embarrassed into promoting agendas designed to promote the public interest. But where privatization is systematically eroding governmental authority, and where power is instead being channelled to or through private actors, the relevance of civil society organizations diminishes and their funding evaporates.

VIII. Rethinking the human rights implications of privatization

65. New strategies are required, which should include the actions set out below.

A. Acknowledge past inadequacies

66. Few problems can be resolved without first being acknowledged. The patent inadequacies of existing responses to the dramatic spread of the privatization of formerly public goods and services must thus be recognized.

B. Reassert basic values

67. Procedural fixes have not worked precisely because privatization is a philosophy of governance rather than just a financing mechanism. A new strategy therefore needs to be focused first and foremost on basic values. Indeed, privatization's original proponents saw it as a question of values, albeit very different ones. Margaret Thatcher famously remarked that "there is no such thing as society ... There is no such thing as an entitlement, unless someone has first met an obligation".[116]

68. In response, the human rights community needs to reassert the centrality of concepts such as equality, society, the public interest and shared responsibilities. Although international law addresses primarily the rights of individuals, human rights are also clearly embedded within and inseparable from society and community. It is not accidental that the Universal Declaration of Human Rights: proclaims its relevance for "every organ of society"; calls for "society and the State" to protect the family; recognizes that everyone, as a member of society, has the right to social security; emphasizes everyone's "duties to the community"; and contemplates limitations on rights only insofar as they meet "the just requirements of morality, public order and the general welfare in a democratic society".

69. Whereas human rights law is premised upon the existence of a competent and benign State, privatization advocates assume the State to be incompetent and/or malign, while casting the private sector as efficient and socially responsible.

70. The human rights community needs to highlight the many reasons why government should be best placed to carry out community responsibilities. They include government's commitment to promoting substantive equality, its capacity to adopt rules that are rendered fair and equitable through processes of consultation and

[116] See Samuel Brittan, "Thatcher was right — there is no 'society'", *Financial Times*, 18 April 2013. Available at www.ft.com/content/d1387b70-a5d5-11e2-9b77-00144feabdc0.

feedback, its embrace of systems of checks and balances designed to avoid capture by any particular group, its eschewal of personal financial profit for administrators, and its answerability for alleged human rights abuses. Under a privatization regime, these considerations are, for the most part, replaced by the single measure of economic efficiency, a concept that cannot possibly capture the range of objectives that those entrusted with promoting the public good should seek to achieve.

C. Relegitimize taxation

71. Since the 1980s, neoliberals have undertaken highly successful efforts to delegitimize taxation. The rise of privatization has reinforced this thrust. As corporations become more politically powerful, they exert greater pressure for lower corporate tax rates, expanded tax concessions or exemptions, and wider loopholes to facilitate tax avoidance. These steps in turn ensure that Governments are severely underfunded and that their capacity to both provide public services and regulate, monitor, ameliorate and, when necessary, supplement private sector activities relating to the public good is greatly constrained.

72. Human rights groups need to highlight the dire consequences, not just for inequality but for human rights in general, of starving Governments of revenue. They need to make the case in favour of a balanced and progressive fiscal regime in the interests of society at large.[117]

D. Reclaim the moral high ground

73. Ironically, the moral high ground of rights language is too often yielded to the privatizers. Where human rights advocates often shy away from asserting a human right to health, to water or to equal access to justice, for fear that such language might alienate conservatives, privatization advocates promiscuously invoke the language of freedom, property rights, autonomy and dignity, albeit often in ways that are entirely alien to agreed international human rights standards. Even the "social contract" is now apparently best achieved through privatization.[118]

74. Rather than abandoning rights language in the context of responding to privatization, both the discourse and the substance of rights need to become the key battleground. Societies that constantly proclaim that human rights are inalienable cannot permit privatization to alienate them.

E. Reset the default

75. The longer-term challenge, which human rights actors certainly cannot achieve on their own, is to reverse the presumption, now fully embraced by actors such as the World Bank, that privatization is the default setting and that the role of the public sector is that of a last-resort actor that does what no one else can or wants to do. Human rights groups need to begin systematically addressing the implications of privatization and documenting and exposing situations in which privatization has generated rights-deficient outcomes. The challenge is to uphold human rights standards, and not just to ask whether public or private actors have performed better.

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[117] See Nicholas Lusiani and others, *Assessing Austerity: Monitoring the Human Rights Impacts of Fiscal Consolidation* (Centre for Economic and Social Rights, 2018).

[118] See Business and Sustainable Development Commission, *Better Business, Better World*, p. 82.

F. Ensure the centrality of human rights in the privatization framework

76. Human rights standards are currently either marginal to or entirely absent from the frameworks governing privatization. This is by design, not by accident, and reinforces the assumption that privatization is on occasion undertaken precisely in order to avoid the constraints that respect for human rights would otherwise apply. Even where this is not the case, the resulting reality is that large swathes of public life are increasingly devoid of human rights protections.

G. Reimagine human rights accountability

77. Accountability is the linchpin of human rights, but privatization has rendered existing mechanisms increasingly marginal. The Human Rights Council, the special procedures system, the treaty bodies and the universal periodic review have barely made a dent in the task of ensuring meaningful accountability on the part of privatized entities. The latter rarely, if ever, engage in a dialogue, constructive or otherwise, with international human rights bodies in relation to alleged rights violations. Instead, they enjoy a degree of immunity that many Governments might relish.

78. Efforts to develop a meaningful legal framework to regulate corporate human rights practices have so far failed, and future prospects are far from encouraging. The challenge, therefore, is to explore ways in which existing mechanisms can be reformed and adapted. New coalitions need to be built, new methods developed and new pressure points identified. Weak national corporate watchdog bodies, often captured by the interests that they are supposed to be monitoring, are no substitute for the independence and impartiality of human rights monitoring. National and regional human rights institutions, in particular, need to explore innovative approaches.

H. Reform public sector accountability

79. Inadequate public sector accountability helped to facilitate the rise of privatization. But even as that has improved dramatically in many countries, the relevant institutions are being starved of resources. This in turn undermines some of the devices promoted by privatization proponents to ameliorate its impact, since they often assume the existence of either a willing and empowered State-sponsored regulatory framework or the functioning of a highly competitive market. And yet it is very often the case that the terms upon which privatization takes place effectively preclude the meeting of either of these two conditions. Even official development assistance, which is also under attack, is being redirected to the private sector rather than being used to strengthen the public sector, for which, ultimately, there is no substitute that will advance respect for human rights.

80. One of the ironies of the move to promote public-private partnerships is that most of their proponents at least pay lip service to the need for countries entering into them to have a strong domestic institutional capacity to create, manage and evaluate them. Yet this is precisely the capacity that is so often lacking in such contexts.

IX. Conclusions and recommendations

81. Neoliberal economic policies are aimed at shrinking the role of the State, especially through privatization. This agenda has been remarkably successful in recent years and continues to be promoted aggressively by the World Bank, IMF, parts

of the United Nations and the private sector. The logic of privatization assumes no necessary limits as to what can be privatized, and public goods ranging from social protection and welfare services, to schools, pension systems, parks and libraries, and policing, criminal justice and the military sector, have all been targeted.

82. Privatization is premised on assumptions fundamentally different from those that underpin respect for human rights, such as dignity and equality. Profit is the overriding objective, and considerations such as equality and non-discrimination are inevitably sidelined. Regulatory and other constraints are viewed as obstacles to efficiency, and accountability for other than economic outcomes sits uneasily at best. Rights holders are transformed into clients, and those who are poor, needy or troubled are marginalized. Caring, compassion, social interaction, solidarity and community, among other things, are alien concepts that belong elsewhere. While civil society has a vital role to play, it cannot possibly shoulder the burden on its own, with neither adequate resources nor authority. There is no substitute for the public sector to coordinate policies and programmes to ensure respect for human rights. Yet privatization directly undermines the viability of the public sector and redirects government funds to subsidies and tax breaks for corporate actors.

83. The consequences for human rights are overwhelmingly negative. Human rights standards are rarely included in privatization agreements. They are systematically absent from guidelines governing both processes and outcomes. With some exceptions, privatized entities are rarely held meaningfully to account, and government and quasi-government agencies responsible for such tasks are often either underfunded or captured by the relevant industry. While it is clear both from the evidence that exists and from the basic assumptions underpinning privatization that it negatively affects the lives and rights of people living on lower incomes or in poverty, the unsurprising fact is that few detailed studies have been undertaken and that relevant data are often not collected. In a 10-year review of World Bank-supported public-private partnerships, it was concluded that the projects were "largely successful in achieving their development outcomes, but data are scarce on the effects on the poor", as well as on access and service delivery. In other words, business performance is carefully tracked, but rights-related or poverty-related impact studies are rare.[119]

84. In the face of externally or internally driven demands for "fiscal consolidation" (austerity), Governments retreat from direct service provision, trade short-term deficits for windfall profits from the sale of public assets, and push hidden financial liabilities down the road for future generations. The opportunity to shed responsibility, rather than to exercise it at arm's length, becomes irresistible. Although it is often suggested that a fully human-rights-compliant regulatory regime can be transferred to the private sector, as argued in the present report, this is a contradiction in terms.

85. The human rights community often seems to assume that privatization involves little more than a change in personnel and uniforms and that public-sector-like obligations and comparable levels of accountability could be maintained, if only the conditions attached were sufficiently detailed and demanding. But this assumption is deeply mistaken. It ignores the motivations driving the process as well as the essential unwillingness of the private sector to take on rights-related obligations, the inability of pared-down Governments to exercise meaningful supervision, the difficulty of monitoring disparate private providers, the removal of much economic decision-making from the purview of democratic contestation, and the wide-ranging

[119] See World Bank, *World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02-12* (Washington, D.C., 2015), p. xiv.

consequences of empowering profit-seeking corporate actors in what used to be the public sphere.

86. Privatization also undermines democracy by marginalizing the role of Governments in deciding on the allocation of public goods and services, thus giving citizens even less incentive to participate in elections. A trend towards political demobilization, especially affecting low-income persons, has occurred in many States in recent years, and austerity policies closely linked to privatization have created fertile ground for the rise of populist, anti-human-rights politicians.

87. While in theory privatization is neither good nor bad, the ways in which it has most often occurred in recent decades and the ideological motivations driving much of it call for a different set of responses from the human rights community. In addition to the long-term strategy outlined above, immediate steps should be taken to:

- Insist that appropriate standards be set by public and private actors involved with privatization to ensure that data on human rights impacts are collected and published, and that confidentiality carve-outs are strictly limited;
- Undertake systematic studies of privatization's impact on human rights in specific areas, and on poor and marginalized communities;
- Insist that arrangements for the privatization of public goods specifically address the human rights implications; and
- Explore new ways in which treaty bodies, Special Procedures, regional mechanisms, and national institutions can meaningfully hold States and private actors accountable in privatization contexts.